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MICHAEL RODAK, JR.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1638

JAMES P. CRAVEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

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October Term, 1972

No. _____

JAMES P. CRAVEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioner, James P. Craven, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered on May 8, 1973.

OPINION BELOW

The Opinion of the Court below is reported at —— F.2d ——. No written Opinion was rendered by the District Court.

JURISDICTION

The jurisdiction of this Court in invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

I. Whether the lower Courts can extend the reach of 18 USC § 922 (h) (1) by creating a judicial presumption that possession is equivalent to receipt in interstate commerce of a firearm?

II. Whether the classification contained in 18 USC § 922 (h) (1) prohibiting a person under indictment from receiving a firearm shipped in interstate commerce is irrational and unjustified and deprives the defendant of due process of law under the Fifth Amendment.

III. Whether 18 USC § 922 (h) (1) violates the due process clause of the Fifth Amendment because the introduction of an indictment of an unproven offense, other than the charge for which the Defendant is on trial, is prejudicial to the extent that it denies him a fair trial.

IV. Whether the Government agents had a right to interrogate the Defendant while he was being fingerprinted when his attorney, who had surrendered him and who was present in the area, did not consent to the institution by them of such interrogation.

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

These are set out verbatim in Appendix A (P. 13-14).

STATEMENT OF FACTS

Petitioner, James P. Craven, was convicted under a Six Count Indictment charging him with violations of the Federal Firearms and Narcotics Laws. Count IV of the Indictment charged Craven with receiving a Smith & Wesson revolver, transported in interstate commerce, while under indictment for a crime punishable by imprisonment for a term exceeding One (1) year, in violation of 18 USC § 922 (h) (1) and 924 (a).

The Government's evidence showed that a police officer of the City of Lexington, Kentucky, owned a Smith & Wesson, Model 10, .38 caliber revolver, Serial Number D18581 and that this officer lost the weapon while on duty on April 12, 1971, in the City of Lexington, Kentucky. Defense testimony showed that approximately April 27, 1971, one John Beeman, obtained this gun from a man from Lexington, Kentucky, known to him as "Hooks."

Several law enforcement officers executed a Search Warrant at one of petitioner's houses authorizing a search for illegal firearms on April 30, 1971. During this search, the revolver was found by these officers. John Beeman testified that he left the revolver in the possession of one Harold McKants on April 29, 1971, at the house which was raided.

The prosecution also established that Craven was under an Ohio Indictment for carrying a concealed weapon from March 26, 1971, through the time of the raid on April 30, 1971. This offense is punishable by imprisonment for a term exceeding one year in Ohio.

On May 4, 1971, Craven surrendered to federal agents accompanied by his attorney, Ronald B. Finn. During fingerprinting and other processing, two agents separately questioned Craven concerning the guns and narcotics found in the raid out of the presence of his attorney. Craven

made certain admissions concerning ownership of the firearms. These two agents testified at the trial of Craven about these conversations.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals for the Sixth Circuit creating a judicial presumption under 18 USC § 922 (h) that when possession is shown, it is presumed that the possessor received the firearm in interstate commerce, is in conflict with prior applicable decisions of this Court.

The Statute in question 18 USC § 922 (h) (1) is part of Title IV of the Omnibus Crime Control and Safe Street Act of 1968, Pub. L. No. 90-351, § 901, 82 Stat. 225. It is a modified and recodified version of 15 USC § 902 (f).

The Court below dealt with this case as one of first impression as there are no reported decisions dealing with this Statute. Also said Court felt the question of the reach of this Statute was specifically left open by this Court. See *United States* v. *Bass,* 404 U.S. 336, 30 L.Ed. 2d 488, 494 (1971) Footnote 10, which states:

> "While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that the 1968 Act changed the prior approach to the 'receipt' offense. See e.g. S. Rep. No. 1097, 90th Cong. 2d Sess. P. 115."

The prior approach to the "receipt" offense is obviously the one taken in *Tot* v. *United States,* 319 U.S. 463, 87 L.Ed. 1519, 63 S. Ct. 1241 (1943), which is quoted in the previously mentioned Footnote as follows:

> "The Act (15 USC § 902 (f)) is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction of such articles which at some prior time, have been transported interstate."

There is obviously a difference between "receipt" offenses and "possession" offenses. In the instant case, the Government showed constructive possession by Craven of the revolver in question on April 30, 1971, and that the revolver was lost in another state on April 12, 1971.

The Court below concluded "that 18 USC § 922 (h) speaks only of receipt of firearms or ammunition in interstate transportation and does not concern possessions at all." This is apparently consistent with the dicta in the *Bass* case which reads ". . . Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate nexus, but is limited to the sending or receiving of firearms as a part of an interstate transportation."

There being only possession proven in the instant case, it was necessary for the Court below to create a judicial presumption, i.e., "receipt under 18 USC § 922 (h) (1) may be shown circumstantially by proving possession at least where no significant passage of time has elapsed between the interstate transportation and proof of possession, and no intervening intrastate transactions have occurred." (App., p. 27)

This is in direct conflict with this Court's holding in the *Tot case*. The Court there dealt with the statutory presumption which made "the possession of a firearm or ammunition by any such person . . . presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act." The Court there held that it

was not rational to conclude that possession tends to indicate that acquisition must have been made in an interstate transaction.

Petitioner submits that if Congress cannot constitutionally create a presumption the receipt was interstate rather than intrastate, then the Court of Appeals for the Sixth Circuit cannot judicially create such a presumption.

Also, the judicial presumption extending the reach of 18 USC § 922 (h) (1) is an obvious misconstruction of the intention of Congress in enacting the Statute. The "Scope of Coverage" in the legislative history shows that Congress did not intend that possession alone be defined as an offense. See S. Rep. No. 1097, 90th Cong. 2d Sess., U.S. Code, Cong. & Admin. News 2166 (1968).

II. Whether the classification contained in 18 USC § 922 (h) (1) prohibiting a person under indictment from receiving a firearm shipped in interstate commerce is irrational and unjustified and deprives the defndant of due process of law under the Fifth Amendment?

18 USC § 922 (h) (1) segregates those persons who may receive firearms in interstate commerce from those individuals who may not. By including in the second category persons who are merely "under indictment for . . . a crime punishable by imprisonment for a term exceeding one year."

The Fifth Amendment does not contain an explicit equal protection clause as does the Fourteenth Amendment applicable on its face only to the states, but statutory classifications may be so unjustified as to be violative of the due process clause of the Fifth Amendment. *Shapiro* v. *Thompson,* 394 US 618 (1969); *Schneider* v. *Rusk,* 377 US 163 (1964); *Bolling* v. *Sharpe,* 347 US 497 (1954).

Consequently the due process clause of the Fifth Amendment provides the same basic safeguards as the equal protection clause and the general principles of the latter apply to the former.

It is now well settled that when legislative classifications affect fundamental rights, a closer scrutiny of them is required and an overriding or compelling interest must appear to support the legislative classifications. See, e.g., *Roe* v. *Wade,* 41 US LW 4213 (U.S. Jan. 22, 1973); *Kramer* v. *Union Free School District,* 395 US 621 (1969); *Shapiro* v. *Thompson,* 394 US 618 (1969); *Levy* v. *Louisiana,* 391 US 68 (1968); *Loving* v. *Virginia,* 388 US 1 (1967). However, in dealing with social or economic legislation or areas where fundamental rights are not involved, a greater latitude is afforded legislative classifications and a statutory classification will not be set aside if a rational basis exists to sustain it. See, e.g., *Hurtado* v. *United States,* 41 USLW 4359 (U.S. March 5, 1973); *McGinnis* v. *Royster,* 41 USLW 4259 (U.S. Feb. 21, 1973); *Lindsey* v. *Normet,* 405 US 56 (1972); *Schilb* v. *Kubel,* 404 US 357 (1971); *Dandridge* v. *Williams,* 397 US 471 (1970); *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

Congress has unjustifiably discriminated against indicted persons, who have the same status in the eyes of the law because of the presumption of innocence as persons not involved in the criminal process. Therefore, since both innocent persons and indicted persons have the same legal status no basis exists for the statute's discrimination.

It should be noted that the presumption of innocence is one of the oldest and strongest concepts known to the Common Law and that an indictment as such does not detract from that presumption. *Reynolds* v. *United States,* 238 F.2d 460, 463 (9th Cir. 1956); *Holt* v. *United States,* 31 S. Ct. 2, 6, 218 US 246, 54 L.Ed. 1021 (1910); *United States* v. *Foster,* 9 FRD 367 (DCNY 1949).

III. 18 USC § 922 (h) (1) violates the due process clause of the Fifth Amendment because the introduction of an indictment of an unproven offense, other than the charge for which the defendant is on trial, is prejudicial to the extent that it deprives the defendant of a fair trial.

In addition to the charge under 18 USC § 922 (h) (1), Craven was tried on five other charges — three additional firearm counts and two narcotic counts. In order for the Government to prove all the elements of a violation of 18 USC § 922 (h) (1), it had to show that Craven was indicted accusing him of a felony prior to the one for which he is being tried.

Petitioner submits that the creation of a "one-stage" trial whereby the jury hears of the prior indictment while considering his innocence or guilt on the § 922 charge and five other Counts is a procedure which violates the due process clause of the Fifth Amendment. Petitioner submits that the jury should have been allowed to consider his innocence or guilt on the other charges and then, if the jury makes a finding of fact that Craven received a firearm in interstate commerce, have it then hear evidence and determine whether he has previously been indicted on a felony charge.

Evidence of prior crimes is generally inadmissible because such evidence prejudices the Defendant on the charge for which he is being tried. See *Marshall* v. *United States*, 360 US 310, 3 L.Ed.2d 1250, 79 S. Ct. 1171 (1959); *Michelson* v. *United States*, 335 US 469, 93 L.Ed. 168, 69 S.Ct. 213 (1948); *Boyd* v. *United States*, 142 US 450, 35 L.Ed. 1077, 12 S. Ct. 292 (1892); *Lovely* v. *United States*, 169 F. 2d 386 (CA 4th Cir. 1948); *Railton* v. *United States*, 127 F. 2d 691 (CA 5th Cir. 1942).

There is no overriding interest of the Government to have the indictment introduced prior to a determination of the "receipt" offense. The jury does not set the penalty, nor does proof of one or more prior convictions enhance the penalty as in *Spencer* v. *Texas,* 385 U.S. 554, 17 L.Ed. 2d 606, 87 S. Ct. 648 (1967).

Petitioner submits that the dissent by Chief Justice Warren in the *Spencer* case contains a rationale why prior convictions should not be introduced. Yet here what is introduced under 18 USC § 922 (h) (1) is an indictment. The accused has not yet been convicted with the protection of due process procedures. Although there are substantial differences legally between a conviction and an indictment, the jury is unable to distinguish any differences.

The Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, e.g., *Tumey* v. *Ohio,* 273 US 510, 71 L.Ed. 749, 47 S. Ct. 437, 50 ALR 1243; *Betts* v. *Brady,* 316 US 455, 86 L.Ed. 1595, 62 S. Ct. 1252; cf. *Gideon* v. *Wainwright,* 372 US 335, 9 L.Ed.2d 799, 83 S. Ct. 792, 93 ALR 2d 733; see *Estes* v. *Texas,* 381 US 532, 14 L.Ed.2d 543, 85 S. Ct. 1628; *Sheppard* v. *Maxwell,* 384 US 333, 16 L.Ed.2d 600, 86 S. Ct. 1507; cf. *Griffin* v. *Illinois,* 351 US 12, 100 L.Ed. 891, 76 S. Ct. 585, 55 ALR 2d 1055.

An important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. *Bruton* v. *United States,* 88 S. Ct. 1620, 391 US 123, 20 L.Ed.2d 476 (1968).

Petitioner submits that evidence of the indictment is so prejudicial as to be irrelevant and incompetent and thereby deprives him of a fair trial and due process of law.

IV. The government agents had no right to interrogate the defendant while he was being fingerprinted when his attorney who had surrendered him and who was present in the area did not consent to the institution by them of such interrogation.

The theory upon which the Government proceeded was that Craven had constructive possession of all the contraband. In its proof the Government offered testimony, which if believed, established that he was the occupant of the premises. Accordingly it was submitted that as such occupant he had constructive possession of the contents of the premises.

If this were the basic issue the only concern would be whether there was sufficient evidence to warrant a jury finding.

However the introduction into evidence of alleged admissions made by the defendant creates a different circumstance. That is why a determination of the admissibility of the alleged admissions becomes critical.

The jury, under we must assume, proper instructions, is to determine the question of constructive possession. It is to determine whether the evidence adduced by the Government satisfies it that the defendant is guilty beyond a reasonable doubt. Its function is utterly destroyed if the admissions establishes in its collective mind that the defendant has, in substance, admitted ownership of the guns and, as a corollary, of the narcotics.

Consequently it is necessary to ascertain whether, under the circumstances, there was a knowledgable relinquishment of a constitutional right.

There is no doubt that the conversation took place in the absence of counsel after two arrests on the several charges.

A mere exculpatory statement does not create the right of the arresting officer to initiate a question. This was a case in which the jury deliberated for approximately ten hours.

The admission into evidence of the admissions which are referred to twice in the opinion and to which proper objection was taken jeopardized the defendant's case as noted above and violated the learning of the cases.

In *Massiah* v. *United States,* (1964) 377 U.S. 201, 84 S. Ct. 1199, 12 L.Ed.2d 246, this Court stated:

> "We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at the trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

In *Whitsell* v. *Perini,* 419 F. 2d 95 (CA 6 1969), the Sixth Circuit stated:

> "If there was any questioning of the appellant in the absence of counsel it was without prejudice to his right to a fair trial unless the specific incriminating statement of which he complains was prejudicial to him. See Crocker v. California, 357 U.S. 433, 439-440, 78 S. Ct. 1287, 2 L. Ed. 2d 1448; Escobedo v. Illinois, 378 U. S. 478, 491, 84 S. Ct. 1758, 12 L. Ed. 2d 977."

In *U. S. ex rel. Lopez* v. *Zelker,* 344 F. Supp. 1050 (S.D. N.Y. 1972) aff. 405 F. 2d 1405, the Court stated:

> "There is no question that the basic principle of Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) applies here. See also Beatly v. United States, 399 U.S. 45, 88 S. Ct. 234, 19 L. Ed. 2d 48 (1967) (per curiam); McLeod v. Ohio, 381 U.S. 356, 85 S. Ct. 1556, 14 L. Ed. 2d 682 (1965)

(per Curiam); United States v. Garcia, 377 F. 2d 321 (2d. Cir.), cert. denied, 389 U.S. 991, 88 S. Ct. 489, 19 L. Ed. 2d 484 (1967); United States v. Accardi, 342 F. 2d 697 (2d Cir), cert. denied, 382 U.S. 954, 86 S. Ct. 426, 15 L. Ed. 2d 359 (1965). The principle, to state it briefly, forbids use at trial of statements elicited from an indicted defendant in the absence of his counsel.[2]

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[2] We put to one side cases where a person under indictment volunteers, without solicitation, the incriminating information. E.g. United States v. Accardi, supra; United States v. DeLay, 421 F. 2d 900 (5th Cir. 1970); Coughlan v. United States, 391 F. 2d 371 (9th Cir.), cert. denied 393 U.S. 870, 89 S. Ct. 159, 21 L. Ed. 2d 139 (1968). There is no doubt in the instant case that agent Bullard deliberately elicited what he later reported in his testimony."

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions, Statutes and Rules

---

18 U.S.C. § 922

(g) It shall be unlawful for any person —

(1) who is under indictment for, or who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugivie from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 210 (v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731 (a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any firearm or ammunition in interstate or foreign commerce.

(h) It shall be unlawful for any person —

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201 (v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in

section 4731 (a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

15 U.S.C. § 902

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugutive [sic] from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year or is a fugutive [sic] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter.

APPENDIX B

No. 72-1738

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JAMES P. CRAVEN, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed May 8, 1973.

Before: CELEBREZZE, MILLER and LIVELY, Circuit Judges.

MILLER, Circuit Judge. The defendant, James P. Craven, appeals his convictions under a six count indictment charging him with violations of the Federal firearms and narcotics laws. The first three counts of the indictment charged, respectively, the possession of an automatic Underwood Carbine, an automatic Beretta pistol and a Maxim Silencer, in violation of 26 U.S.C. §§ 5861 (d) and 5871. Count IV of the indictment charged Craven with receiving a Smith & Wesson revolver, transported in interstate commerce, while under indictment for a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §§ 922 (h) (1) and 924 (a). Counts V and VI charged the defendant with possession of heroin

in violation of 26 U.S.C. § 4704(a) and 21 U.S.C. §§ 173 and 174, respectively. After a jury trial, the defendant was found guilty on all counts and sentenced to a total of 40 years imprisonment and fined $30,000.

On April 30, 1971, law enforcement officers searched a residence at 10180 Rustic Lane in Woodlawn, Ohio, pursuant to a federal search warrant directing the seizure of illegal firearms. The search uncovered an automatic Underwood Carbine (Count I), a Smith & Wesson revolver (Count IV), a strong box containing $13,000 in cash and monogrammed men's shirts bearing the initials JPC, in the master bedroom of the house. In a secret compartment located in the vertical riser of the basement stairs, the officers found a Beretta automatic pistol (Count II), a P-38 pistol and a Maxim Silencer designed for use with the P-38 (Count III).[1] Also found in this compartment was a brown paper sack containing 1852 glassine bags of heroin, 2000 empty glassine bags, a clear plastic bag containing heroin and a quantity of narcotic dilutants (Counts V and VI).[2] At the time of the police raid the defendant was not present at this residence but his wife, Mrs. Jackie Craven, and two other adults and three children were present.

The residence from which the illicit weapons and narcotics were recovered had been owned by a Mr. and Mrs. Christian until November 1970, when it was sold and title placed in the name of the Commons Corporation. Prior to this sale the defendant and his wife viewed the house with a third party who participated in negotiating the sale

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[1] The Underwood Carbine, Beretta pistol and the Maxim Silencer are all firearms as defined in 26 U.S.C. § 5845 and were not registered to the defendant or anyone else as required by 26 U.S.C. § 5861(d).

[2] There were no transfer tax stamps on or near the heroin as required by 26 U.S.C. § 4704(a).

to the Commons Corporation. Subsequently, in December 1970, the property was transferred from the corporate entity to James P. Craven and Jackie Craven who moved into the house immediately after the Christians vacated it. Christian designed and built the Rustic Lane house in 1951 and lived in it with his family continuously until they moved in late December 1970. At the time the Christians vacated the house there was no secret compartment in the basement stairs.

On December 23, 1970, water service to the property was placed in the defendant's name and on December 28, 1970, Craven purchased a lawn tractor from a dealer in the area. This equipment was later delivered to 10180 Rustic Lane. On three occasions — December 1970, January and February 1971 — a locksmith installed locks and rekeyed locks in the house and on each visit he dealt with Mrs. Craven. However, on February 17, 1971, the locksmith returned to the house and the defendant requested the locksmith to open the bedroom door because he was locked out. The locksmith opened the door, changed the lock tumblers and made two new keys.

In March 1971, one Alice Freeman went to the Rustic Lane house where Jackie Craven and the housekeeper were present. The defendant arrived later and sold Alice Freeman a white powder in a plastic bag in the basement of the house. On April 22, 1971, one Joel Cornelius went to the residence to collect his bill for putting a new roof on the house which he had installed at Mrs. Craven's request. He was met by Mrs. Craven and shown to the master bedroom where the defendant was sitting up in bed in his underwear. Craven then gave a key to Jackie Craven who went to a strong box in the closet, removed a paper bag, and handed the bag to the defendant. The sack contained small bills and Craven counted out $3,100 and

paid Mr. Cornelius. While the roofer was in the house he saw a revolver which looked like the weapon forming the basis of Count IV of the indictment lying near the defendant on the bed. He also observed several rifles lying about.

When the defendant surrendered to the authorities on May 4, 1971, he was accompanied by his attorney. Agent Ginetz of the Bureau of Narcotics and Dangerous Drugs read Craven the Miranda warnings and the defendant was processed through the customary booking procedures. While these administrative steps were being taken, Agent Ginetz and the defendant engaged in a conversation away from Craven's attorney. In response to the agent's inquiry about the guns the defendant stated that he was a gun collector. When asked about the machine guns the defendant said that he had had the machine guns for some time. While the defendant was being fingerprinted another agent inquired about the firearms and Craven told him that he had been collecting guns and had moved them to the Rustic Lane house from another location.

After the raid, Craven again met Alice Freeman and told her that the government did not have a case against him. He also stated to her that he was not present at the time of the raid and that he should have moved the "stash" earlier.

The defense presented evidence that Craven's fingerprints were not on the bag in which the heroin was discovered and that two other individuals besides Jackie Craven resided in the house. Further defense evidence showed that the defendant did not live at the Rustic Lane address but that he lived with another woman at a separate address. Also evidence was presented that on the night before the raid the other individuals in the house gave a party and a guest left the revolver named in Count IV of the indictment at the house.

I

The defendant contends that the district court erred in denying his motion for a judgment of acquittal as to all six counts of the indictment made at the conclusion of both the government's case and again when the defense rested. In reviewing a motion for a judgment of acquittal the evidence and all reasonable inferences from the evidence must be viewed in the light most favorable to the government. If in that light, the evidence is such that a reasonable mind might fairly find guilt beyond a reasonable doubt, the issue is for the jury and the refusal to grant a judgment of acquittal must be sustained. *United States* v. *Collon,* 426 F.2d 939 (6th Cir. 1970); *United States* v. *Smith,* 399 F.2d 896 (6th Cir. 1968); *United States* v. *Carabbia,* 381 F.2d 133 (6th Cir. 1967); *United States* v. *Smith,* 343 F.2d 847 (6th Cir. 1965); *United States* v. *Grimes,* 332 F.2d 1014 (6th Cir. 1964). This principle, of course, applies to each element of the alleged offense.

Counts I, II and III

Under Counts I, II, and III of the indictment the defendant is charged with violating 26 U.S.C. § 5861 (d) which states:

> It shall be unlawful for any person—
>
> . . . .
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

The defendant contends that the government's evidence is insufficient to establish possession of the named firearms.

Possession may be either actual or constructive and it need not be exclusive but may be joint. *United States* v.

Black, — F.2d — (6th Cir. 1972); *United States* v. *Holt,* 427 F.2d 1114 (8th Cir. 1970). Actual possession exists when a tangible object is in the immediate possession or control of the party. Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others. *United States* v. *Viraglio,* 441 F.2d 1295 (5th Cir. 1971); *United States* v. *Burch,* 313 F.2d 628 (6th Cir. 1963). Both actual possession and constructive possession may be proved by direct or circumstantial evidence. It is not necessary that such evidence remove every reasonable hypothesis except that of guilt. *United States* v. *Morgan,* — F.2d — (6th Cir. 1972); *United States* v. *Bishop,* 437 F.2d 97 (6th Cir. 1971); *United States* v. *Prieur,* 429 F.2d 1237 (6th Cir. 1970); *United States* v. *Bradley,* 421 F.2d 924 (6th Cir. 1970); *United States* v. *Burkeen,* 350 F.2d 261 (6th Cir. 1965); *United States* v. *Grimes,* 332 F.2d 1014 (6th Cir. 1964).

In this case the evidence, when viewed most favorably for the government, amply establishes that Craven had constructive possession of the firearms named in the first three counts of the indictment. He clearly exercised constructive possession of the house and indeed the defendant concedes this point. Although possession of the residence is insufficient to establish possession of all the contents of the house, the government's evidence went much further. The Underwood Carbine (Count I) was found in the master bedroom of the residence, a room in which monogrammed men's shirts bearing the defendant's initials were found. The defendant was also placed in this room by the roofer's testimony which reasonably indicated that Craven slept in the room and therefore had constructive

joint possession of it. Added to these facts were two statements made by Craven in response to inquiries about the guns seized in the raid that he collected guns which allowed the jury reasonably to infer that these weapons belonged to him. Therefore this evidence was sufficient to establish constructive possession of the firearm named in Count I of the indictment. The evidence of the defendant's constructive possession of the house combined with his admissions concerning the guns were sufficient to establish constructive possession of the firearm and silencer found in the secret compartment in the basement stairs (Counts II and III). The lower court did not err in refusing to grant a judgment of acquittal and it necessarily follows that the evidence is sufficient to support the jury verdict on these three counts.

Count IV

The defendant challenges the district court's refusal to grant a judgment of acquittal on Count IV of the indictment which charges Craven with violating 18 U.S.C. § 922 (h) (1). The applicable part of this statute reads:

> It shall be unlawful for any person—
>
> (1) who is under indictment for a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate of foreign commerce.

The only element of this offense which the defendant contends was not established by the prosecution was that of receipt of the firearm.

The government's evidence showed that a police officer of the City of Lexington, Kentucky, owned a Smith & Wesson, Model 10, .38 caliber revolver, Serial Number

D186581 and that this officer lost the weapon while on duty on April 12, 1971, in the City of Lexington. The evidence also disclosed that Joel Cornelius, the roofer who put a new roof on the Rustic Lane house, saw a revolver that looked like the revolver named in Count IV lying on the bed in which the defendant was sitting on April 22, 1971. A Smith & Wesson, Model 10, .38 caliber revolver, Serial Number D186581 was found in the master bedroom of the Rustic Lane house by federal officers executing the search warrant. The prosecution also established that Craven was under an Ohio indictment for carrying a concealed weapon from March 26, 1971, through the time of the raid on April 30, 1971. This offense is punishable by imprisonment for a term exceeding one year in Ohio.

The defendant's argument on this point is twofold: first, that the government failed to show that Craven possessed the revolver, and second, that merely showing possession is insufficient to prove receipt under 18 U.S.C. § 922 (h) (1). Both branches of the defendant's argument are untenable.

The prosecution produced evidence sufficient to warrant a jury in finding that Craven had constructive possession of the revolver. The government's proof indicated that the defendant had, at a minimum, joint constructive possession of the house and that only eight days prior to the date the defendant was charged with possessing the weapon, he was seen in the master bedroom of the residence sitting in bed with a revolver which looked like the firearm named in Count IV lying on the bed. Further, the defendant's own admissions concerning the weapons found during the raid were sufficiently broad to permit the jury reasonably to conclude that this revolver was encompassed by the statements.

The second portion of the defendant's argument presents a question of first impression since no reported decision to date has dealt with 18 U.S.C. § 922 (h) (1). This section is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L.No. 90-351, § 901, 82 Stat. 225, and varies little from previous statutes.[3] In *United*

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[3] 18 U.S.C. § 922(h) is a modified and recodified version of 15 U.S.C. § 902(f) (1964), Act of Oct. 3, 1961, Pub.L.No. 87-342, § 2, 75 Stat. 757. Also of interest is 18 U.S.C. § 922(g) which succeeds 15 U.S.C. § 902(e) (1964), Act of Oct. 3, 1961, Pub.L.No. 87-342, § 2, 75 Stat. 757. Both of the earlier sections amended the original statute, Act of June 30, 1938, ch. 850, § 2, 52 Stat. 1250.

Former 15 U.S.C. § 902(e) and (f) state:

> (e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugutive [sic] from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.
>
> (f) It shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year or is a fugutive [sic] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter.

The new statutes, 18 U.S.C. § 922(g) and (h) state:

> (g) It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 210 (v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

States v. *Bass*, 404 U.S. 336 (1971), the Supreme Court dealt with a part of Title VII of the same Act, 18 U.S.C. App. § 1202 (a),[4] and in construing that section spoke of

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to ship or transport any firearm or ammunition in interstate or foreign commerce.

(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful used of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

A comparison of the new and old statutes reveals that 15 U.S.C. § 902(e) is identical to the new 18 U.S.C. § 922(g) except that two classifications have been added under the new legislation. 18 U.S.C. § 922(h) carries over both the old classifications of 15 U.S.C. § 922 (f) and adds three new ones. For our purposes the new statute adds the classification of persons indicted for a crime punishable by imprisonment for a term exceeding one year which was not in 15 U.S.C. § 902(f). Also the statutory presumption declared unconstitutional in *Tot* v. *United States*, 319 U.S. 463 (1943) is deleted from the new statute. *See* S. Rep. No. 1097, 90th Cong., 2d Sess., 2 U.S. Code, Cong. & Admin. News 2205 (1968).

[4] 18 U.S.C.App. § 1202(a) states:

Any person who—

(1) Has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

18 U.S.C. § 922 (g) and (h) in determining the proper construction of § 1202 (a).[5] Although the Court's remarks concerning § 922 (h) are clearly dicta and the question of the reach of this section was specifically left open,[6] the Court's statements are informative because they comport with the accepted interpretation of the predecessor statutes of § 922 (h). In *Bass* the Court commented that:

> Title IV [18 U.S.C. §§ 922 (g) and (h)] apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation. 404 U.S. at 342-43 (footnote omitted).

This interpretation is compatible with what the Court noted in *Tot* v. *United States,* 319 U.S. 463 (1943), when speaking of 15 U.S.C. § 902 (f), the predecessor of 18 U.S.C. § 922 (h).

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(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[5] In *United States* v. *Bass,* 404 U.S. 336 (1971) the Court held that the phrase "in commerce or affecting commerce" in 18 U.S.C.App. § 1202(a), *supra, Note 4,* modifies the offenses of "receiving" and "possessing" as well as that of "transporting" a firearm and therefore that the government must prove as an element of the offense the interstate commerce nexus in all instances.

The Court noted in *Bass* that, according to the legislative history of the Omnibus Crime Control and Safe Streets Act of 1968, Title VII was intended to complement Title IV but whatever reading of 18 U.S.C.App. § 1202(a) was adopted it would be, in part, redundant with 18 U.S.C. § 922(g) and (h). Therefore, the Court chose to construe § 1202(a) narrowly.

[6] *United States* v. *Bass,* 404 U. S. 336, 343 n.10 (1971).

> Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct. 319 U.S. at 466.

Therefore, we conclude that 18 U.S.C. § 922 (h) speaks only of receipt of firearms or ammunition in interstate transportation and does not concern possessions at all. But the construction we place on this statute, which recognizes a distinction between the receipt offenses under 18 U.S.C. § 922 (h) and the receipt offenses under 18 U.S.C.App. § 1202 (a),[7] and also necessarily differentiates between receipt offenses and possession offenses, does not save the defendant's position. The government's evidence, which established Craven's constructive possession of the revolver, was circumstantial evidence which allowed the jury reasonably to infer that Craven received the firearm. The interstate transportation element of § 922 (h) was met by the prosecution's evidence of the very recent Lexington, Kentucky, to Woodlawn, Ohio, transportation of the weapon.[8] Since one cannot possess something, either actually

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[7] *Supra*, note 6 at 343-44 and 350 n.18.

[8] The defendant's reliance on *Tot* v. *United States*, 319 U.S. 463 (1943) is misplaced. *Tot* dealt with the statutory presumption (see *supra*, note 3) of the now repealed 15 U.S.C. § 902(f). In the Court's words *Tot* concerned:

> the question of the power of Congress to create the presumption which § 2 (f) declares, namely, that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and

or constructively, without receiving it, either actually or constructively[9] (except when the possessor manufactures it himself), receipt under 18 U.S.C. § 922 (h) (1) may be shown circumstantially by proving possession, at least where no significant passage of time has elapsed between the interstate transportation and proof of possession, and no intervening intrastate transactions have occurred. Therefore, we find that the district court's refusal to grant a judgment of acquittal on Count IV was correct and that the evidence is sufficient to uphold the verdict on this count.

Counts V and VI

Count V of the indictment charged Craven with violating 26 U.S.C. § 4704 (a)[10] and Count VI alleged viola-

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(2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute. 319 U.S. at 466.

The Court determined that the statutory presumption was unconstitutional and in part held that "there seems no reasonable ground for a presumption that its [the firearms] purchase or procurement was interstate rather than in intrastate commerce." 319 U.S. at 468. In the instant case no judicial presumption is created as to the interstate transportation but this element was specifically established by the government's evidence.

[9] *See United States* v. *Brown*, —— F.2d —— (6th Cir. 1973); *United States* v. *McCreary*, 455 F.2d 647 (6th Cir. 1972).

[10] 26 U.S.C. § 4704(a) states:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

This statute was repealed by Act of Oct. 27, 1970, Pub.L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292 which became effective the day after

tions of 21 U.S.C. §§ 173 and 174.[11] These statutes contain rebuttable presumptions that proof of possession of narcotics is sufficient to sustain a conviction[12] and it is the prosecution's evidence of possession which the defendant claims is insufficient to have allowed these counts to go to the jury.

The government's proof disclosed, and the defendant con-

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the date of the charged offense. However, the savings clause of Pub.L. No. 91-513 states:

> Prosecutions for any violations of law occurring prior to the effective date of section 1101 [the first day of the seventh calendar month that begins after Oct. 26, 1970] shall not be affected by repeals or amendments made by such section or section 1102 or abated by reason thereof.

[11] 21 U.S.C. § 173 prohibited the importation of narcotic drugs, made certain exceptions for crude opium and coca leaves, prohibited importation of crude opium for the manufacture of heroin and provided for forfeitures.

21 U.S.C. § 174 set penalties for bringing narcotic drugs into the United States contrary to law, for conspiring to commit unlawful acts concerning such narcotics and made unexplained possession of narcotics sufficient evidence for conviction.

These two statutes were repealed by Act of Oct. 27, 1970, Pub.L. No. 91-513, § 1101(a)(2)(4), 84 Stat. 1291 which became effective the day after the date of the charged offenses. The savings clause of Pub.L. No. 91-513 also applies to these two statutes, *supra*, note 10.

[12] The statutory presumption contained in 26 U.S.C. § 4704(a) is set forth in *supra*, note 10. The statutory presumptions of 21 U.S.C. § 174, which apply to § 173 as well, state:

> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> . . . .
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

cedes, that Craven had constructive possession of the Rustic Lane house where the narcotics were found in a secret compartment in the basement stairs. The testimony of Alice Freeman concerning her purchase from the defendant of a white powder in the basement of the house the month before the raid inferentially demonstrated that Craven had access to the basement area where the secret compartment was located. Her testimony also described a conversation she had with Craven after the police raid on the house in which the defendant told her the government did not have a case against him and that he should have moved the "stash" earlier. Although the defendant's use of the word "stash" could refer to the illegal weapons, the narcotics or both, the statement could reasonably be construed to mean the narcotics, especially since the defendant had previously sold this witness a white powder in the basement of the house and had not dealt in firearms with her. Added to these facts, the illegal weapons named in Counts II and III of the indictment were found in the secret compartment with the heroin. We have already determined that the evidence was sufficient to uphold a finding of constructive possession of these firearms. Therefore, we hold that the evidence is sufficient to support the conclusion that Craven had access to and dominion and control over the secret compartment and its contents. The motion for a judgment of acquittal was properly denied on these counts.

II

The defendant attacks the constitutionality of 18 U.S.C. § 922 (h) (1) [13] on several grounds. First, it is said that the classification contained in the statute prohibiting a

[13] *Supra,* note 3.

person under indictment from receiving a firearm shipped in interstate commerce is irrational and unjustified and deprives defendant of due process of law under the Fifth Amendment. Second, it is argued that the statute violates the Fifth Amendment's due process clause because the introduction of an indictment for an offense other than the crime of which the defendant is accused is prejudicial and denies defendant a fair trial.

The defendant's first argument is essentially that § 922 (h) (1) segregates those persons who may receive firearms in interstate commerce from those individuals who may not. By including in the second category persons who are merely "under indictment for . . . a crime punishable by imprisonment for a term exceeding one year"[14] Congress has unjustifiably discriminated against indicted persons, who have the same status in the eyes of the law because of the presumption of innocence as persons not involved in the criminal process. Therefore, since both innocent persons and indicted persons have the same legal status no basis exists for the statute's discrimination.

The Fifth Amendment does not contain an explicit equal protection clause as does the Fourteenth Amendment applicable on its face only to the states, but statutory classifications may be so unjustified as to be violative of the due process clause of the Fifth Amendment. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Schneider* v. *Rusk,* 377 U.S. 163 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Consequently, the due process clause of the Fifth Amendment provides the same basic safeguards as the equal protection clause and the general principles of the latter apply to the former.

It is now well settled that when legislative classifications

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[14] 18 U.S.C. Sec. 922 (h)(1).

affect fundamental rights a closer scrutiny of them is required and an overriding or compelling interest must appear to support the legislative classifications. *See, e.g., Roe* v. *Wade,* 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973); *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Loving* v. *Virginia,* 388 U.S. 1 (1967). However, in dealing with social or economic legislation or areas where fundamental rights are not involved a greater latitude is afforded legislative classifications and a statutory classification will not be set aside if a rational basis exists to sustain it. *See,* e.g., *Hurtado* v. *United States,* 41 U.S.L.W. 4359 (U.S. March 5, 1973); *McGinnis* v. *Royster,* 41 U.S.L.W. 4259 (U.S. Fed. 21, 1973); *Lindsey* v. *Normet,* 405 U.S. 56 (1972); *Schilb* v. *Kubel,* 404 U.S. 357 (1971); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

In *United States* v. *Thoresen,* 428 F.2d 654 (9th Cir. 1970), an opinion with which we fully agree, the Ninth Circuit determined that shipping or transporting firearms in interstate or foreign commerce under the now repealed 15 U.S.C. § 902 (e) was not a basic or fundamental right. Although 18 U.S.C. § 922 (h) (1) does not proscribe shipping or transporting firearms (*see* 18 U.S.C. § 922 (g)) but instead prohibits receiving firearms in interstate commerce, it follows, a fortiori, from the *Thoresen* holding that receiving firearms shipped in interstate commerce is not a basic constitutional right. Therefore, 18 U.S.C. § 922 (h) (1) must be upheld if the classification scheme has any rational basis to support it.

The Congressional findings and declaration of purpose of Title IV of the Omnibus Crime Control and Safe Streets

Act of 1968[15] and the legislative history of this title[16] amply demonstrate the nexus between violent criminal activity and the use of firearms. It was eminently reasonable for Congress to conclude that the indictment of an individual for a crime punishable by imprisonment for a term exceeding one year is so often indicative of a propensity for violence that the indictment classification of 18 U.S.C. § 922 (h) (1) was justified in the public interest. Since Title IV of the Act is a modified and more comprehensive version of the Federal Firearms Act of 1938 and its subsequent amendments,[17] what the Ninth Circuit stated in *Thoresen* concerning this statutory scheme is equally applicable to § 922 (h) (1).

> Having in mind the objectives of Congress in enacting this legislation, as discussed above, we find no warrant for a judicial determination that the indictment classification effectuated by section 2 (e) is so lacking in rationality that it offends due process. . . . [W]e think it not unreasonable for Congress to conclude that there is considerable likelihood that one indicted for such an offense has a propensity to misuse firearms. In so deciding we note that this conclusion by Congress, as crystallized in section 2 (e), is not forever conclusive upon a person so indicted. The prohibitory effect of the classification disappears as soon as the indicted person obtains dismissal of the indictment or acquittal on the charge.
>
> . . . While the provision in question does forbid indicted persons from transporting [receiving] firearms in interstate commerce while the indictment is out-

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[15] Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, § 901, 82 Stat. 225.

[16] S. Rep. No. 1097, 90th Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News 2112, 2113-14, 2163-69, 2197-2200, 2205 (1968).

[17] *Supra*, note 3.

> standing, the indictment serves only as a temporary block pending disposition of the criminal proceedings in which the indictment was filed. Bearing in mind that we are not dealing with statutory restrictions upon such constitutionally sensitive activities as free speech or the right to vote, we think Congress may, in pursuit of the sound objectives of the legislation, require indicted persons to tolerate this temporary limitation upon their right to transport weapons in interstate commerce. 428 F.2d at 662.

See Williams v. *United States,* 426 F.2d 253 (9th Cir. 1970); *United States* v. *DePugh,* 266 F.Supp. 453 (W.D. Mo. 1967), aff'd 393 F.2d 367 (8th Cir. 1968).

The defendant's second argument, that this statute violates the due process clause of the Fifth Amendment because the introduction of an indictment of an unproven offense, other than the charge for which the defendant is on trial, is prejudicial and detracts from the presumption of innocence, is also untenable. This same contention was decided adversely to the defendant in *United States* v. *Thoresen, supra,* where the Ninth Circuit stated:

> [The defendant] came to this criminal trial with a constitutionally-protected presumption of innocence. See Deutch v. United States, 367 U.S. 456, 471, 81 S.Ct. 1587, 6 L.Ed.2d 963 (1961). But section 2(e) [§ 922(t)(1)] does not purport to affect the presumption of innocence which cloaks all defendants in federal criminal proceedings. It does not authorize the fact finder at the criminal trial to infer guilt under the Federal Firearms Act [§ 922(h)(1)] from the existence of a prior indictment or even to discount the credibility of a witness because of such an indictment. Instead, as applied to [the defendant] it represents nothing more than a Congressional determination that one who is under indictment for crimes . . . ought not to transport [receive] firearms in interstate com-

merce unless and until the indictment is dismissed or an acquittal is obtained.

There inheres in this determination a Congressional finding that persons under indictment for such offenses may have a propensity for misusing firearms. But it is a legislative finding operative only in formulating a statutory scheme for controlling misuse of firearms. . . . In our opinion, this provision of the statute does not adversely affect the presumption of innocence which prevails at federal criminal trials and which is guaranteed by the Due Process Clause of the Fifth Amendment. 428 F.2d at 661.

We have carefully considered the other contentions raised by the defendant and find them without merit.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1738

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES P. CRAVENS, a/k/a JAMES P. CRAVEN,
Defendant-Appellant.

Before: CELEBREZZE, MILLER and LIVELY, Circuit Judges.

JUDGMENT

(Filed May 8, 1973)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1638

JAMES P. CRAVEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner raises several constitutional challenges to the validity of 18 U.S.C. 922(h)(1) (receipt of firearms in interstate commerce) and alleges denial of the Sixth Amendment right to counsel.

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of all charges under a six-count indictment charging him with violations of the federal firearms and narcotics laws. The first three counts charged the possession of three unregistered automatic weapons in violation of 26 U.S.C. 5861(d) and 5871. The fourth count charged petitioner with receiving a revolver, transported in interstate commerce, while under indictment for a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(h)(1) and 924(a). The final two counts

charged possession of heroin in violation of 26 U.S.C. (1964 ed.) 4704(a) and 21 U.S.C. (1964 ed.) 173 and 174. Petitioner was sentenced to six consecutive terms of imprisonment totalling forty years and fined $30,000. The court of appeals affirmed.

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. B), shows that, pursuant to a search warrant, law enforcement officers searched petitioner's residence in Woodlawn, Ohio, on April 30, 1971. The search revealed three automatic weapons (Counts I-III), a Smith & Wesson revolver (Count IV), and various quantities of narcotics (Counts V-VI). The revolver was shown to have been lost by a police officer on April 12, 1971, in the City of Lexington, Kentucky. A roofer testified that on April 22, 1971, he had seen lying near petitioner on the bed in the house's master bedroom a weapon which looked like the revolver named in Count IV, and that he had also seen several rifles lying about (Tr. 560-562).

1. Three of petitioner's four contentions consist of challenges to the constitutional validity of 18 U.S.C. 922(h)(1)[1] upon which Count IV of the indictment was based. He argues, first, that the court below held that "when possession is shown, it is presumed that the possessor received the firearm in interstate commerce" (Pet. 4), and he contends that such a presumption

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[1] 18 U.S.C. 922(h)(1) provides as follows:

(h) It shall be unlawful for any person—

(1) who is under indictment for * * * a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

violates due process. The decision below, however, rests on no such presumption. The court of appeals' opinion explicitly recognizes that conviction under Section 922(h)(1) requires a finding of " 'the receipt of firearms * * * as part of interstate transportation' " (Pet. App. 26, quoting *Tot* v. *United States,* 319 U.S. 463, 466). The court correctly concluded that the evidence that the revolver had been lost by a police officer on April 12, 1971, in Kentucky, and was next seen in petitioner's possession on April 22, 1971, in Ohio, was sufficient to support the jury's determination that petitioner had received the weapon in interstate commerce.[2]

2. Petitioner also argues that the statute's classification prohibiting one under indictment from receiving a firearm shipped in interstate commerce is irrational and thus violative of the Fifth Amendment's due process clause. There is no merit to this contention. While legislative classifications affecting fundamental rights must be justified by compelling state interests (see *Shapiro* v. *Thompson,* 394 U.S. 618) in less sensitive areas legislative discrimination will not be set aside if a rational basis exists to sustain it (see *Schilb* v. *Kuebel,* 404 U.S. 357, 365; *Dandridge* v. *Williams,* 397 U.S. 471, 484-485). We agree with the analysis of the court below that the right to receive firearms in interstate commerce falls into the latter category and that it was thus permissible for Congress to determine that, as a class, indicted individuals pose more of a potential threat than other members of the community as recipients of firearms. See *United States*

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[2] The jury was specifically instructed that a guilty verdict could be entered only upon a finding that petitioner had received the revolver in interstate commerce (Tr. 909-910).

v. *Thoresen,* 428 F. 2d 654 (C.A. 9); *Williams* v. *United States,* 426 F. 2d 253 (C.A. 9); *United States* v. *DePugh,* 266 F. Supp. 453 (W.D. Mo.), affirmed, 393 F. 2d 367 (C.A. 8), certiorari denied, 393 U.S. 832 (all dealing with similar prohibitions against indicted individuals). While one merely indicted is of course presumed to be innocent, this has never precluded the imposition of certain limited burdens on such individuals, such as the requirement of bail. See *Schilb, supra,* 404 U.S. at 365.

3. Section 922(h)(1) requires, as an element of the crime, that the individual receiving firearms in interstate commerce be currently under indictment.[3] The jury here was specifically cautioned that proof of petitioner's earlier indictment was to be considered only for purposes of satisfying that particular element of Section 922(h)(1) (Tr. 908). Petitioner nonetheless contends that the introduction of the indictment was impermissibly prejudicial and that a bifurcated trial would have been more appropriate. While evidence of prior criminal activity is normally inadmissible, this general rule is marked with exceptions, many of which were recognized by this Court in *Spencer* v. *Texas,* 385 U.S. 554, 560-561, including the situation where, as here, the prior conduct or status constitutes an element of the current violation. See also *Michelson* v. *United States,* 335 U.S. 469, 483; *McGautha* v. *California,* 402 U.S. 183, 209-210. And *Spencer* specifically rejected the contention that a bifurcated trial is constitutionally required where, as here, the jury was specifically cautioned that the evidence of previous criminal activity was to be considered only for a limited purpose. 385 U.S. at 567-568.

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[3] Petitioner was indicted under Ohio state law on March 26, 1971, for carrying a concealed weapon.

4. Petitioner was not present during the search of his residence but later, accompanied by his attorney, he surrendered to federal authorities. He was twice warned of his *Miranda* rights, once by an agent of the Bureau of Narcotics and Dangerous Drugs and once by a Treasury Department agent. The officers then commenced administrative paperwork regarding the arrest, during the course of which petitioner initiated a conversation regarding the charges against him. The agents responded by inquiring about the weapons found during the search, which evoked several statements by petitioner admitting his ownership of them. Petitioner's attorney was in the same room during this interchange, but apparently was not within hearing range (Tr. 684-692, 706-710).

Petitioner now claims that the introduction of those statements to prove his ownership of the weapons violated his Sixth Amendment right to counsel under *Massiah* v. *United States,* 377 U.S. 201. Unlike the situation in *Massiah,* however, petitioner was neither under indictment nor surreptitiously led into a discussion with the authorities; indeed, petitioner initiated the conversation himself after having twice been told his *Miranda* rights. It is well established that one represented by counsel can waive consultation and make an admission. See *United States* v. *Garcia,* 377 F. 2d 321, 324 (C.A. 2); *United States* v. *Brown,* 459 F. 2d 319, 323, n. 3 (C.A. 5); *Dillon* v. *United States,* 391 F. 2d 433, 437 (C.A. 10); *Coughlan* v. *United States,* 391 F. 2d 371, 372 (C.A. 9); *United States* v. *Kress,* 446 F. 2d 358, 362 (C.A. 9). In any event, any error on this point would have been harmless in this case, for substantial independent evidence conclusively demonstrated peti-

tioner's ownership of the weapons.[4] See *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

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[4] As the court below noted, it was adduced at trial that petitioner owned and lived in the house where the weapons were discovered, and that he had been observed, eight days prior to the search, in his bedroom with the revolver and a variety of rifles (Pet. App. 16-18; Tr. 560-562).

[illegible]

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NO. 72-1638

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

JAMES P. CRAVEN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON DENIAL OF PETITION FOR A WRIT OF CERTIORARI

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I

Petitioner's third argument raised in his Petition for a Writ of Certiorari is that 18 USC § 922 (h) (1) violates the due process clause of the Fifth Amendment because the introduction of an indictment of an unproven offense, other than the charge for which the Defendant is on trial, is prejudicial to the extent that it deprives the Defendant of a fair trial.

On October 3, 1973, the Court of Common Pleas for Hamilton County, Ohio, placed of record the following entry of dismissal:

> "This cause came on for hearing on Motion for the Defendant to dismiss the indictment herein. The Court upon hearing thereof found said Motion to be well taken and grants same.

IT IS THEREFORE ORDERED that the indictment herein be dismissed and the Defendant be released from surety."

This is the same indictment that was introduced against Petitioner as an element of 18 USC § 922 (h) (1). Petitioner submits that this constitutes an intervening circumstance of substantial effect warranting rehearing.

Petitioner submits that the indictment introduced against him while the Jury was considering six other charges against him now being dismissed shocks the conscience and violates due process of law.

In *Thoresen* v. *United States,* 428 F2d 654 (1970), a conviction was reversed, in a similar situation, for "a hearing on the constitutional validity of the prior Maine conviction that provides the underpinning for Thoresen's convictions on counts one and five and for Mrs. Thoresen's conviction on count two."

This creates a chaotic condition where one can challenge the validity of a conviction to be used against him in a prosecution under 18 USC § 922 (h) (1) but not the validity of an indictment. One has to wait until the indictment is dismissed. Petitioner submits that this Court should grant certiorari to clarify this situation.

II

Unfortunately, this case was somewhat slow in getting into print in the "Advance Sheets," hence, a citation was not available for either the Petitioner or Government. It is now available and is *United States* v. *Craven,* 478 F. 2d 1329 (CA 6, 1973).

Petitioner had hoped that the manner in which this decision of the Sixth Circuit Court of Appeals will be ap-

plied would have demonstrated the need for review by a Writ of Certiorari.

By the creation of a judicial presumption with respect to the receipt of firearms in interstate commerce, the decision below shifts the burden from the Government's proving the elements of its case beyond a reasonable doubt to the Defendant to show (1) no significant time has elapsed between the interstate transportation and proof of possession and (2) no intervening intrastate transactions have occurred. (In the case at bar, the Defendant came forward and proved an intrastate transaction, however, this evidence was ignored.)

In addition to being a gross misinterpretation of the Statute, as enacted by Congress, the decision below destroys a Defendant's right under the Fifth Amendment to remain silent. He is forced to testify and potentially incriminate himself.

Respectfully submitted,

PETER F. BEASLEY
211 E. 4th Street
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CERTIFICATE

I hereby certify that the foregoing Petition is presented in good faith and not for delay and it is restricted to intervening circumstances of a substantial effect.

.....

PETER F. BEASLEY